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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FCC 94M-374

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In re Applications of)	MM DOCKET NO. 93-94 ✓
)	
SCRIPPS HOWARD BROADCASTING COMPANY)	File No. BRCT-910603KX
)	
For Renewal of License of Station WMAR-TV)	
Baltimore, Maryland)	
)	
and)	
)	
FOUR JACKS BROADCASTING, INC.)	File No. BPCT-910903KE
)	
For a Construction Permit for a New)	
Television Facility on Channel 2)	
at Baltimore, Maryland)	

ORDER

Issued: May 26, 1994

; Released: May 31, 1994

The Presiding Judge has completed an in camera review of 109 pages of documents that were submitted by Scripps Howard Broadcasting Company ("Scripps Howard") on May 19, 1994, in accord with bench rulings at the Prehearing Conference of May 10, 1994.

The documents were submitted along with a pleading that is entitled Production Of Documents For In Camera Review. Thirty eight documents were identified under the general category Notes Of Attorneys. There were itemizations of twenty nine documents under the sub-heading Work Product. There were itemizations of nine documents under the heading Attorney-Client And Work Product. Ten additional documents were identified under the category Memos and Correspondence. Nine of those documents were described as Work Product, and one document was described as Attorney-Client And Work Product.

Each document was reviewed for purposes of determining whether it contained information that was communicated between client and attorney and on which discovery and/or trial advice was given or which was likely to have effected a decision by counsel in the course of this litigation. Such documents qualified for the attorney-client privilege and will not be ordered to be disclosed. See WWOR-TV, Inc., 5 F.C.C. Rcd 6261, 6262 (Comm'n 1990).¹

¹ Each of the documents also was examined to determine whether it might contain any evidence of fraudulent conduct on the part of Scripps Howard or its agents. Cf. Welch Communications, Inc., 4 F.C.C. Rcd 3979, 3982 n.12 (Review Bd 1989) (privilege fails when it is used to further fraud or other fundamental misconduct). No such evidence was found.

Also, documents for which the work product exception was claimed were examined to determine whether there was a substantial need for facts contained in those documents and if so, whether there were means of discovering substantially the same information by other means. See WWOR TV, Inc., supra. With the exception of one document, the Presiding Judge has concluded that substantially the same information concerning the NBC documents and the Covington notes have been discovered through the deposition and the hearing testimony and the post-hearing affidavit of Ms. Emily Barr and the affidavit of Mr. Brett Kilbourne.² Also, additional substantially equivalent evidence can be obtained in the future depositions of Ms. Barr, Ms. Covington and Mr. Kilbourne which have been authorized. It is concluded that the few facts that might be missed that are contained in the privileged documents will not skew the record or deny Four Jacks the discovery to which it is entitled under the Commission's rules.

However, there is one substantial fact concerning the NBC documents for which there is a substantial need and which may not otherwise be discovered. That fact is contained in the notes of one of Scripps Howard's counsel who need not be identified. Therefore, the Presiding Judge will require the document (part of one page) to be disclosed with appropriate masking so that counsel's identity³ and mental impressions, conclusions, opinions and legal theories are not disclosed. The instruction will be given to Scripps Howard's counsel by the Judge's Legal Technician via telephone. A copy of the masked document must be furnished to the Presiding Judge at the time it is furnished to counsel. In connection with that production, there will be no waiver of the privileges that may otherwise apply to the document and there will be no waiver of the privileges with respect to the subject matter disclosed in the document.

Scripps Howard also must disclose or explain certain gaps in specified documents. These include:

- Document SHA000023, Para. 20 at Page 5, reflects apparent omissions for item 4 and item 11 and there is no accompanying explanation.
- Document SHA000032, Para. 29 at Page 7, reflects apparent omission for item 2 and there is no accompanying explanation.

² Four Jack also has obtained information about the discovery of the Covington notes in the affidavit of Mr. David N. Roberts. Although Mr. Roberts will not be deposed (unless ordered by the Commission) the information in the Roberts affidavit can be inquired about in the deposition of others having knowledge of the facts.


³ The attorney is not Mr. Roberts.

Ruling⁴

IT IS ORDERED that upon the receipt of further instruction from the Presiding Judge on document identification and redaction, Scripps Howard SHALL PRODUCE the document to counsel for Four Jacks and to Bureau counsel by 4:00 p.m. on June 02, 1994.

IT IS FURTHER ORDERED that explanations for the gaps in identified documents SHALL BE SUBMITTED by 4:00 p.m. on June 02, 1994.

FEDERAL COMMUNICATIONS COMMISSION



Richard L. Sippel
Administrative Law Judge

⁴ Copies were made available to counsel on the date of issuance. Counsel for Scripps Howard should call the Judge's Legal Technician for instructions upon receipt of this Order.